Filed 4/4/19 P. v. Munoz CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LUIS OSCAR MUNOZ, JR., Defendant and Appellant.	F074536 (Super. Ct. No. BF157975A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Steven M. Katz, Judge.

Rebecca P. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Lewis A. Martinez and Jennifer Oleska, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

Luis Oscar Munoz, Jr., (defendant) was charged with nine felony counts relating to the kidnapping and rape of one victim and the assault of a second victim under similar circumstances. He was also charged with misdemeanor hit and run. A jury acquitted him

of attempted aggravated kidnapping but returned guilty verdicts on the remaining charges. The trial court imposed a prison sentence of 50 years to life, plus five years.

On appeal, defendant challenges the sufficiency of the evidence supporting his misdemeanor conviction. There are additional claims of error under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) based on the admission of hearsay at trial. Lastly, defendant alleges prosecutorial misconduct based on statements made during the People's rebuttal argument. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On October 10, 2014, a man accosted Jane Doe (victim 1) with a knife outside of her apartment. She had just returned from walking her children to school, during which time she had noticed a black vehicle driving through her neighborhood. The driver had been acting "strange."

The man with the knife asked victim 1 if she was alone. She said something to the effect of, "[J]ust me and my baby." The victim was in her second trimester of pregnancy, but she was referring to a one-year-old child who was asleep inside of the apartment. After entering her residence, the man coerced victim 1 to engage in various sex acts, including intercourse. Before departing, he washed his hands in her bathroom sink.

The man stole the victim's cell phone, which prevented her from immediately reporting the incident. She used a neighbor's telephone to call her mother and, at her mother's urging, subsequently dialed 911. The 911 call was placed within approximately 20–30 minutes of the crime.

When contacted by police, victim 1 described her attacker as a "younger and shorter" Hispanic male who had "a written tattoo on his neck." She further noted his thin build and "small goatee." After speaking with a detective, she underwent a physical examination conducted by a forensic nurse examiner. Biological evidence retrieved from the victim's right breast was found to contain a mixture of deoxyribonucleic acid (DNA)

from at least three different people. Investigators also recovered trace amounts of DNA from inside the victim's apartment.

Two weeks later, on October 24, 2014, Jane Doe 2 (victim 2) was attacked outside of her home after walking her grandchildren to school. The perpetrator was a Hispanic male who had been standing on the sidewalk next to a parked car. When she attempted to walk past him, the man shoved her and brandished a knife. He asked where she lived and if anyone was home. She gave an equivocal response, and he tried to force her into the vehicle.

Victim 2 was able to break free and ran screaming toward her back yard. She soon "heard him starting the car," and, shortly thereafter, a "crash noise." Moments later, victim 2's boyfriend came out of the house and said, "This guy just got in a hit-and-run out front." The boyfriend called 911, and police responded "[w]ithin a couple of minutes."

The investigating officer arrived to find vehicular debris in the street, including "a black bumper to a vehicle with a license plate attached to it." While interviewing victim 2, the officer heard a report of a car accident occurring a few streets away involving a black Honda Accord with the same license plate number. He and victim 2 travelled to the second location and she "immediately identified the vehicle" as the one she had seen outside her residence.

The driver of the Honda, i.e., defendant, was found in possession of a butterfly knife. Upon being shown a picture taken of him at the scene of the accident, victim 2 identified defendant as her attacker. Police later obtained a sample of his DNA, which was tested against the specimens from the incident involving victim 1. The testing revealed, with virtual statistical certainty, that defendant was a contributor to the DNA mixture found on victim 1's right breast.[1]

[1]According to expert testimony, the likelihood of defendant being a contributor to the DNA mixture was 6.8 quintillion times more probable than "a coincidental match" to some other member of the Hispanic population. Defendant's DNA was also matched to a two-person

In relation to victim 1, defendant was charged with rape by means of force or fear (Pen. Code, § 261, subd. (a)(2); count 1); oral copulation by means of force or fear (*id.*, former § 288a, subd. (c)(2) [now § 287, subd. (c)(2)]; count 2); kidnapping with intent to commit rape (*id.*, § 209, subd. (b)(1); count 3); first degree burglary (*id.*, §§ 459, 460, subd. (a); count 4); and assault with a deadly weapon (*id.*, § 245, subd. (a)(1); count 5). Counts 1 and 2 included special circumstance allegations pleaded pursuant to section 667.61, subdivisions (d)(2), (4), and (e)(1)–(3). Counts 3 and 4 included enhancement allegations of personal use of a knife (*id.*, § 12022, subd. (b)(1)).

In relation to victim 2, defendant was charged with attempted kidnapping (Pen. Code, §§ 207, subd. (a), 664; count 7); attempted kidnapping with intent to commit rape (*id.*, §§ 209, subd. (b)(1), 664; count 6); assault with a deadly weapon (count 8); and making criminal threats (*id.*, § 422; count 9). Counts 6, 7, and 9 included enhancement allegations of personal use of a knife. Defendant was also charged with hit-and-run driving resulting in property damage (Veh. Code, § 20002, subd. (a); count 10).

The charges were tried before a jury in August 2016. The People's evidence established the facts summarized above. In addition, both victims identified defendant in court as the man who had attacked them.

With the exception of an acquittal on count 6, defendant was convicted as charged. He was sentenced to consecutive prison terms of 25 years to life for the rape of victim 1 and related oral copulation offense, plus five years for the attempted kidnapping of victim 2. Punishment for counts 3–5 and 8–9 was stayed pursuant to Penal Code section 654. A concurrent jail term was imposed for the hit-and-run conviction. This timely appeal followed.

---

mixture collected from a faucet handle in the victim's bathroom, but the statistical probability was lower. In that analysis, the chances of the contributor being a different Hispanic individual were calculated to be 1 in 64,000.

DISCUSSION

I. Sufficiency of the Evidence (Count 10)

To establish a violation of Vehicle Code section 20002, subdivision (a), the People must show the defendant "(1) knew he or she was involved in an accident; (2) knew damage resulted from the accident; and (3) knowingly and willfully left the scene of the accident (4) without giving the required information to the other driver(s)." (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1123, fn. 10.) Actual knowledge of property damage is not required; constructive knowledge may be imputed to the defendant based on the surrounding circumstances. (*People v. Carter* (1966) 243 Cal.App.2d 239, 241–242.) In this case, defendant contends "no evidence showed that he damaged any property other than his own car."

An appellate court must view the record "'in the light most favorable to the prosecution'" (*People v. Bolden* (2002) 29 Cal.4th 515, 553) and "accept logical inferences that the jury might have drawn from the circumstantial evidence" (*People v. Maury* (2003) 30 Cal.4th 342, 396). In light of the controlling standard, we reject defendant's claim. A police officer testified, albeit somewhat ambiguously, to the circumstance of a two-car collision. The involvement of a second vehicle is also inferable from the statement made by victim 2's boyfriend: "This guy just got in a hit-and-run …." Photographs of the scene, which were shown to the jury, did not support the theory of a collision with a nonvehicular object, and no such theories were offered by the defense.

A collision involving significant force is inferable from the crime scene evidence, which in turn permits the inference of damage to both vehicles. Victim 2 heard the sound of a crash, and the impact resulted in the entire front bumper of defendant's vehicle becoming dislodged. There were photographs of the bumper and a large piece of black paneling lay in the street. Given the extent of cosmetic damage to defendant's vehicle, it

was reasonable for the jury to conclude the other vehicle also sustained appreciable damage.

II. Hearsay Claims

Defense counsel objected to the admission of an audio recording of the first 911 call and a report prepared by the forensic nurse examiner. The report included quoted statements attributed to victim 1. The defense argued both items contained inadmissible testimonial hearsay. On appeal, defendant maintains the admission of this evidence was erroneous and violated his constitutional rights.

"Hearsay is an out-of-court statement that is offered for the truth of the matter asserted, and is generally inadmissible." (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1108.) The right of confrontation, as guaranteed by the Sixth Amendment to the federal Constitution and made applicable to the states through the Fourteenth Amendment, ensures the opportunity for cross-examination of adverse witnesses. (*People v. Fletcher* (1996) 13 Cal.4th 451, 455.) In *Crawford*, *supra*, 541 U.S. 36, the United States Supreme Court held the confrontation clause bars the admission of testimonial hearsay unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. (*Id.* at p. 59.) "Testimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony." (*People v. Sanchez* (2016) 63 Cal.4th 665, 689.)

During the 911 call, victim 1 answered questions regarding the physical description of her attacker. Citing *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*), defendant argues the victim's statements were testimonial and inadmissible because the primary purpose of the questioning was to gather evidence for possible use in a criminal prosecution. The claim fails on the merits because victim 1 testified at trial.

"[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." (*Crawford*, *supra*, 541 U.S. at p. 59, fn. 9, citing *California v. Green* (1970) 399 U.S.

149, 162.) In other words, "the *Crawford* rule does not apply when the declarant testifies and is thus subject to cross-examination." (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 413.) The *Davis* case considered the admissibility of statements by parties who did *not* testify at trial, and it provides no support for defendant's position. (*Davis*, *supra*, 547 U.S. at pp. 818–820.)

In a secondary argument, defendant contends victim 1's statements to the dispatcher were inadmissible under state law. At best, his briefing raises the question of admissibility under the hearsay exception for prior consistent statements. (See Evid. Code, §§ 791, subd. (b) & 1236.) Defendant neglects to acknowledge that the trial court believed it was "obvious" the hearsay qualified as "an excited utterance." The judge relied on the audio recording of the 911 call ("you can tell by the voice"), which apparently was not designated for inclusion in the record on appeal.

"A statement may be admitted, though hearsay, if it describes an act witnessed by the declarant and '[w]as made spontaneously while the declarant was under the stress of excitement caused by' witnessing the event." (*People v. Gutierrez* (2009) 45 Cal.4th 789, 809, quoting Evid. Code, § 1240.) This is sometimes called the "excited utterance" exception. (See, e.g., *People v. Penunuri* (2018) 5 Cal.5th 126, 150–151; *People v. Merriman* (2014) 60 Cal.4th 1, 65.) "Neither lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance." (*People v. Washington* (1969) 71 Cal.2d 1170, 1176.)

An interval of 20 to 30 minutes, as was estimated in this case, may fall within the parameters of Evidence Code section 1240. In *People v. Poggi* (1988) 45 Cal.3d 306, a victim's statements made 30 minutes after she had been stabbed, which included descriptions of the assailant's skin color and possible race, were held admissible under the statute. (*Id*. at pp. 316, 318–320.) Depending on the circumstances, the exception

may apply even several hours after a crime has been committed. (See, e.g., *People v. Brown* (2003) 31 Cal.4th 518, 541 [statement uttered 2.5 hours after declarant's witnessing of a murder was made "under the emotional influence of the disturbing events he perceived"]; *People v. Raley* (1992) 2 Cal.4th 870, 893–894 [upholding the admission of a statement made 18 hours after a brutal sexual assault].)

A trial court must determine whether the foundational requirements of the excited utterance exception have been satisfied, and its conclusions are reviewed under the abuse of discretion standard. (*People v. Poggi*, *supra*, 45 Cal.3d at pp. 318–319.) Defendant's failure to address this issue is fatal to his claim. If legal arguments are not furnished on a particular point, the court may treat it as waived and pass it without consideration. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1029; *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 538 [failure to brief an issue on appeal "constitutes a waiver or abandonment of the issue"].) It is ultimately defendant's burden to demonstrate error (*People v. Gamache* (2010) 48 Cal.4th 347, 378), and the requisite showing has not been made.

Defendant's Sixth Amendment claim with regard to the nurse's report is also untenable given the fact both she (the nurse) and victim 1 testified at trial. Once again, there is an alternative claim of state law error. Rather than analyze the latter contention, we will explain why any such error was harmless.[2]

---

[2]The trial court concluded the report was admissible as a business record, presumably in reliance on Evidence Code section 1271. If properly authenticated, medical records are admissible under the business records exception to the hearsay rule. "Authentication requires the entries to have been made in the regular course of business, at or near the event and the method and time of preparation tend to indicate the entry's trustworthiness." (*People v. Landau* (2016) 246 Cal.App.4th 850, 872, fn. 7.) However, "[m]ultiple hearsay may not be admitted unless there is an exception for each level. [Citation.] For example, in the case of [an] emergency room document, the report itself may be a business record (Evid. Code, § 1270 et seq.), while the patient's statement may qualify as a statement of the patient's existing mental or physical state (Evid. Code, § 1250, subd. (a))." (*People v. Sanchez*, *supra*, 63 Cal.4th at p. 675.) Defendant's claim impliedly raises the issue of whether exceptions exist for each of the multiple levels of hearsay in the report.

The statements in dispute are quotes attributed to victim 1 regarding the details of her ordeal. These are a few pertinent examples: "'He showed me the knife,'" "'He grabbed my breasts and he pushed my head down,'" "'He made me give him oral sex on my couch,'" "'He said, "I am giving you a gift to get rid of your whoreness."'"

The admission of hearsay in violation of state law does not warrant reversal unless it is reasonably probable the defendant would have obtained a more favorable result had the evidence not been admitted. (*People v. Duarte* (2000) 24 Cal.4th 603, 618–619, citing *People v. Watson* (1956) 46 Cal.2d 818, 836–837.) Assuming the challenged statements were inadmissible, nearly all of them were cumulative of the victim's trial testimony. (See *People v. Bryant, Smith and Wheeler*, *supra*, 60 Cal.4th at pp. 414–415 [alleged hearsay error deemed harmless because admissible evidence "conveyed the same information"]; *People v. Riccardi* (2012) 54 Cal.4th 758, 804 [any prejudice from alleged hearsay error was "substantially mitigated by other admissible evidence"].) Moreover, each pertained to how the crimes were committed, not the identity of the perpetrator. The commission of the crimes was a conceded issue.[3]

On the question of identity, there was independent and overwhelming proof of defendant's involvement. Victim 1 described her attacker as a short, thin, young Hispanic male who had "a written tattoo on his neck." In the 911 call, she estimated he was 18 to 25 years old. According to the record, defendant is five feet four inches tall, weighs approximately 130 pounds, and was 23 years old at the time of his arrest. Defendant's wife, the lone defense witness, confirmed he has a tattoo of the name "Janessa" on the left side of his neck. Victim 1 identified defendant in court as the man

[3]Defense counsel made the following statements during closing argument: "I'm not going to dispute whether these events happened. Of course, it happened. These horrible events really happened. These are real people, real victims …. [¶] … My basic premise is[,] as we say in shorthand in the law, some other dude did it. That's it. Some other dude did it. It wasn't this guy."

who raped her, and her testimony was supported by DNA evidence. Given these circumstances, any error in admitting the nurse's report was clearly harmless.

III Alleged Prosecutorial Misconduct

A. Background

During his closing remarks, defense counsel argued the People's DNA evidence was unreliable. He characterized the processes used by the crime laboratory as arcane and described technical aspects of the test results as "a potential either source of error or … source of misinterpretation." Counsel also faulted investigators for not testing certain specimens for amylase (an enzyme present in saliva), and he noted there was additional evidence collected from the victim's apartment that was not tested for DNA.

The People's rebuttal included the following statements: "[W]e heard … that there are still DNA samples over in the lab available for anyone to test. You did not hear any expert come into this courtroom and state that the testing was wrong; that it was different; that it was contaminated or anything like that. None of this was questioned and you don't have that evidence. Both sides have the same power to subpoena and bring in witnesses. There is no evidence presented to you that there is any flaws with the DNA process in this case. You have to base your reasonable doubt on the evidence in the case. There is no reasonable doubt as to that DNA."

Later, outside the presence of jurors, defense counsel argued the prosecutor "stepped over the line a little bit" by alluding to the "fact that the samples are still available and that essentially the Defense could have tested those items." He continued, "The reason I'm concerned is because I would suggest that this improperly shifts the burden to the Defense …." The trial court disagreed, and it denied counsel's request for a pinpoint instruction stating, "The burden never shifts to the Defense" and/or "The Defense is not under any burden to do that testing."

B. Analysis

Defendant maintains the prosecutor "committed prejudicial misconduct when she criticized the defense for failing to retest DNA samples." (Boldface and some capitalization omitted.) Stated differently, the People are accused of impliedly "shifting the burden of proof to the defense." We disagree.

"A distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1340.) In our view, the challenged remarks fall into the first category. Two analogous cases guide our analysis.

In *People v. Hughes* (2002) 27 Cal.4th 287 (*Hughes*), comments were made regarding the lack of evidence to support certain defense theories. The prosecutor said, "Where is there a single piece of evidence that [defendant] somehow killed—something snapped because they were surprised at [seeing] each other [in the apartment]? Where is there evidence of that? *Where is there a witness to testify to that*? Where is there a piece of physical evidence to suggest that?" (*Id*. at pp. 372–373.) The California Supreme Court construed these remarks as "nothing more than proper fair comment on the state of the evidence." (*Id*. at p. 373.)

A related issue in *Hughes* concerned the defendant's alleged degree of intoxication at the time of the charged homicide. "The prosecutor stated: 'The defense has called no witness that could testify that this is what he drank or how much he drank,' and 'there has been no evidence that [defendant] ingested any cocaine that day.'" These statements were condoned as observations regarding "the general state of the evidence," and permissible argument "that the defense theory of the case was based upon speculation." (*Hughes*, *supra*, 27 Cal.4th at p. 373.)

In *People v. Cook* (2006) 39 Cal.4th 566, the prosecutor asked an expert witness "if the defense could have subjected the autopsy bullets to its own testing by an independent laboratory." (*Id*. at p. 607.) The defendant alleged prosecutorial

misconduct, arguing "the prosecutor impermissibly sought to shift the burden of proof." (*Ibid*.) In rejecting the claim, the California Supreme Court noted "the prosecutor did not ask whether the defense had a duty to do independent testing, [but] merely whether the defense had an opportunity to do so. [Citation.] *Pointing out that contested physical evidence could be retested did not shift the burden of proof*." (*Ibid*., italics added.)

Here, the prosecutor offered a valid retort to specific criticism. The rebuttal was "merely responsive to defense counsel's own arguments to the jury on the state of the evidence." (*People v. Stanley* (2006) 39 Cal.4th 913, 952.) Her remarks "did little more than urge the jury not to be influenced by counsel's arguments, and to instead focus on the testimony and evidence in the case." (*Ibid*.) The statements "did not cross the critical line, as there is no reasonable likelihood the jurors would have understood the prosecutor's argument as imposing any burden on defendant." (*People v. Young* (2005) 34 Cal.4th 1149, 1195; see *id*. at pp. 1195–1196 [no misconduct in stating, "'[W]hat fact other than conjecture and insinuation do you have to say there is a reasonable interpretation of that evidence that leads to the defendant's innocence? … None. You don't have any…. [¶] There is no evidence'"].) Therefore, we reject the assertion of error.

DISPOSITION

The judgment is affirmed.

_____
PEÑA, J.

WE CONCUR:

_____
POOCHIGIAN, Acting P.J.

_____
DETJEN, J.